

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Case No. 1:11cr4
Akron, Ohio
Plaintiff, Tuesday, March 13, 2012

vs.

ERIC TUTSTONE,
Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

SENTENCING HEARING

APPEARANCES:

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Court Reporter: Lori Ann Callahan, RMR-CRR
United States District Courthouse
Room 568
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Akron, Ohio 44308
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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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P R O C E E D I N G S

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THE COURT: Please be seated, ladies and

10:08:34 5

gentlemen.

6

For the record, the court has before it today

7

Case Number 1:11cr04. Case is United States of America

8

versus Eric Tutstone.

9

We're here today for purposes of sentencing.

10:08:48 10

Counsel for the government, you ready to

11

proceed?

12

MR. BROWN: Yes, the government is ready.

13

Good morning, Your Honor.

14

THE COURT: On behalf of the defendant?

10:08:54 15

MR. KERSEY: Yes, I am, Judge. Thank you.

16

THE DEFENDANT: Excuse me, Your Honor. Did

17

you get my notice and my motion?

18

THE COURT: What notice and motion are you

19

referring to, sir?

10:09:05 20

THE DEFENDANT: Not being represented by

21

Mr. Kersey.

22

THE COURT: And what reasons do you have for

23

not wishing Mr. Kersey to represent you?

24

THE DEFENDANT: For various reasons, Your

10:09:15 25

Honor. Mainly because I'm not satisfied with his

1 performance at trial, and I am -- he's going to be one of my
2 reasons for my appeal.

3 THE COURT: Uh-huh.

4 And what is it specifically that causes you
10:09:32 5 concern?

6 THE DEFENDANT: There was issues that was not
7 raised during trial that should have been raised. Also,
8 there was evidence that was not admitted to trial also.

9 THE COURT: Well, that's a matter, sir, we can
10:09:45 10 address, or will address, I am sure, either on appeal or by
11 way of what's called a 2255.

12 I am -- the issue before me is whether or not
13 Mr. Kersey can effectively represent you for purposes of a
14 sentencing hearing. And that is what I am interested in
10:10:00 15 hearing from you, is what, if any, reason you have that
16 Mr. Kersey can't effectively represent you for purposes of
17 this proceeding.

18 THE DEFENDANT: Well, I'm not confident with
19 proceeding because of his performance during trial, Your
10:10:16 20 Honor.

21 THE COURT: Mr. Tutstone, I am constrained to
22 believe that -- perhaps there really isn't any problems with
23 Mr. Kersey. It's just an ongoing problem, sir, with all due
24 respect. This is the fourth attorney that's been appointed
10:10:29 25 to represent you. All of them, without fail, have been

1 skilled practitioners, who have appeared before me on
2 numerous occasions and have done an outstanding job, and
3 none of them -- you've not been satisfied with any of them
4 or with any of their work on your behalf. And you haven't
10:10:45 5 been happy with perhaps the advice that they have given you
6 with regard to this matter.

7 So, at this point, sir, with all due respect,
8 four attorneys, all, again, very capable practitioners here
9 in federal court, and state court in some respects, and none
10:11:01 10 of them have satisfied you. So I'm not really inclined,
11 unless I hear some specific reasons why Mr. Kersey cannot
12 represent you, I'm not really inclined to remove him or ask
13 him to step down and appoint someone else with whom you can
14 then be unhappy with.

10:11:17 15 THE DEFENDANT: Well, with all due respect,
16 Your Honor, Mr. Kersey, I am sure, is an adequate lawyer,
17 but I know for a fact that he did not represent me to his
18 best capability during trial. Therefore, I don't believe he
19 will artfully argue any arguments that I have at sentencing.
10:11:37 20 For one, there's not much in his memorandum to help support
21 any of the issues that I want to be raised here at
22 sentencing.

23 THE COURT: What hasn't he raised that you
24 wish him to raise?

10:11:51 25 THE DEFENDANT: Well, there's variances from

1 the sentencing guidelines that should have been raised.

2 That should have been put in his memorandum.

3 THE COURT: Why don't you be more specific,
4 because he submitted a memorandum which I've read. Why
10:12:03 5 don't you be specific. What is it that you think he should
6 have raised that he has not raised?

7 THE DEFENDANT: That there are variances from
8 the sentencing guidelines, as well as the downward
9 departures, Your Honor.

10:12:13 10 THE COURT: He's referenced both in his
11 memorandum. He's outlined in the very beginning of the --
12 the caption of his motion or this memorandum is requesting a
13 variance departure. And then he's argued for variance and
14 departure in his memorandum.

10:12:28 15 So he has made those arguments. He's
16 referenced your so-called tragic personal history,
17 sociological factors, exposure to domestic violence. He's
18 named any number of reasons why -- so unless I hear
19 something more specific from you, sir, then I am going to go
10:12:45 20 forward with the hearing, because we have gone round and
21 round with numerous attorneys to represent you, none of who
22 which have been able to satisfy you. That's all it is, is
23 the question of satisfying you; and I am, quite frankly,
24 tired of the gamesmanship.

10:13:00 25 So unless I hear something specific, then

1 we're going to proceed and I will impose sentence in the
2 matter.

3 Mr. Kersey, do you wish to be heard, sir,
4 regarding the matter?

10:13:08 5 MR. KERSEY: Thank you, Judge. I just want to
6 clarify for the court, Judge, in the sentencing memorandum
7 and the objection to the PSI, I went down and met with my
8 client, Mr. Tutstone, and I took -- I took copious notes on
9 what his concerns were with respect to sentencing, his
10:13:29 10 concerns were and his wishes as to a variance/departure that
11 the court may entertain. We discussed that.

12 And all of what we have discussed, Judge, is
13 put in the sentencing memorandum. And I think Mr. Tutstone
14 is looking at it for the first time, although, he has access
10:13:49 15 online. Judge, indeed I did put it in there. I did request
16 it. I went through things that were -- that were I thought
17 legally sound based on case law, U.S. versus Lopez, Deigert.
18 I have them in the sentencing memorandum, Judge, if the
19 court would please.

10:14:02 20 And I did that to not only accommodate his
21 intentions and his wishes, but I also did it because I
22 thought there was a valid -- there was a valid issue there
23 with respect to his childhood upbringing, which is
24 encompassed in all of the four points, the four points that
10:14:23 25 I put in the memorandum, tragic personal history,

1 sociological factors, exposure to domestic violence. The
2 defendant suffered extraordinary mental abuse as a child.

3 All of that, and I also asked the court if the
4 court would recommend -- be so kind for drug treatment,
10:14:36 5 because he is addicted to marijuana as it is in the PSI.

6 Other than that, I would rest on the
7 sentencing memorandum that the court has read.

8 THE COURT: Have you been able to meet with
9 Mr. Tutstone and discuss the PSI?

10:14:49 10 MR. KERSEY: Yes, we did, Judge.

11 THE COURT: Have you reviewed it with him?

12 MR. KERSEY: Yes, I did. I read that -- we
13 went over there. He's got a copy of it and, you know, it's
14 been highlighted and underlined and gone through it
10:15:01 15 completely.

16 THE COURT: All right. Mr. Tutstone, anything
17 further?

18 THE DEFENDANT: Well, he just said, Your
19 Honor, that this is my first time seeing his memorandum, so
10:15:15 20 I don't know -- I want to apologize to the court for any
21 delays, but like he said, this is my first time seeing it,
22 and I do see that he does have all those things he just said
23 in the memorandum. But unbeknownst to me, I did not know
24 this until this moment, Your Honor, so this was no attempt
10:15:34 25 to delay the court for any proceedings at all.

1 THE COURT: Mr. Kersey, is this the first time
2 that Mr. Tutstone has been able to see the memo?

3 MR. KERSEY: Judge, that's correct. It was my
4 understanding that he has access online and that I did file
10:15:49 5 it. That's correct. He just read it and indicates that
6 indeed there is everything that he wants that we discussed
7 is in there, Your Honor. That's true.

8 THE COURT: Everything is in there?

9 MR. KERSEY: Yes, according to my notes.
10:16:01 10 Would that be fair to say, what we discussed is in that
11 sentencing memo?

12 THE DEFENDANT: Yes, it is.

13 MR. KERSEY: Yes, it is, he says.

14 THE COURT: Okay.

10:16:08 15 MR. KERSEY: I applied that to the law and
16 also to his wishes, Judge.

17 THE COURT: Mr. Tutstone, do you need some
18 time to read the memorandum? It's three pages.

19 THE DEFENDANT: Yes, sir. I appreciate that,
10:16:16 20 Your Honor.

21 THE COURT: Take a few moments. You can
22 review it and read it, and we will go forward.

23 (Pause.)

24 THE DEFENDANT: Thank you, Your Honor.

10:18:36 25 THE COURT: All right. You acknowledge that

1 you have -- Mr. Kersey has indicated that he did review with
2 you the presentence investigation report and you reviewed
3 that and discussed that with him as well?

4 THE DEFENDANT: Yes, sir, Your Honor.

10:18:47 5 THE COURT: All right. The report sets forth
6 a number of objections, and just so it's clear for the
7 record, I will overrule the motion seeking to remove
8 Mr. Kersey and appoint new counsel. There's been no reason
9 presented other than the defendant's unhappiness with the
10:19:03 10 ultimate outcome of his trial.

11 Those are matters that will yet be resolved
12 for purposes of appeal or through a 2255 potentially. I
13 would just note as an aside, the defense of the matter was a
14 challenge at best given the fact the government was armed
10:19:21 15 with audio and video recordings that clearly established, at
16 least in my view, made it much more likely a conviction
17 would be had, and clearly made it much easier for the
18 government to establish the defendant's guilt in this case.

19 It's difficult for any defendant to overcome
10:19:40 20 what was presented here in court, that being the audio and
21 video recordings that clearly established, in my mind, his
22 guilt in this case, and to combat same, made it very
23 difficult for counsel.

24 So in any event, and just note for the record,
10:19:53 25 Mr. Kersey is the fourth attorney that's been appointed to

1 represent this defendant. He has been unhappy with all of
2 them, and I've honored his wish in the past for appointment
3 of new counsel. But there's been no sufficient grounds or
4 basis for the court to remove Mr. Kersey, no sound reasons
10:20:09 5 given why he cannot continue to represent the defendant at
6 sentencing.

7 Indeed, he has done his job, and that is,
8 reviewed the PSI, filed objections, and filed the
9 appropriate memoranda seeking a departure and/or variance.

10:20:22 10 So having said that, we will turn to any
11 unresolved objections, and then we will address the balance
12 of the issues before the court regarding the sentencing
13 hearing.

14 The first objection is set forth in paragraph
10:20:36 15 1 on page 25. This objection, as well as many, are
16 objections that relate to the probation officer's review of
17 the evidence and/or the offense conduct that relates to
18 paragraph 8, paragraph 10 and paragraph 11. All of those
19 are the objections set forth on paragraph 25, as well as
10:21:07 20 paragraph 12, excuse me, paragraph 4 referencing paragraph
21 12, as well as the other remaining objections that are set
22 forth at pages 25 and 26. All of the objections are, in
23 essence, to the probation officer's recollection or
24 restatement of the offense conduct, of course, which the
10:21:29 25 defendant disputes in large part.

1 I need not resolve these objections, simply
2 because the offense conduct as outlined has been established
3 for the benefit of the jury. The jury has heard the
4 evidence, has found the defendant guilty beyond a reasonable
10:21:45 5 doubt. And so while the defendant may maintain his
6 innocence and maintain his disagreement with the facts, the
7 jury has so found and, therefore, I need not resolve these
8 objections. And they are overruled based on the jury's
9 finding in the matter.

10:22:01 10 Having said that, counsel for the government,
11 are there any objections you wish to raise, any unresolved
12 objections at this time?

13 MR. BROWN: None, Your Honor.

14 THE COURT: Any further objections on behalf
10:22:13 15 of the defendant, Mr. Kersey?

16 MR. KERSEY: None at this time, Judge.

17 THE COURT: All right. The court obviously is
18 required to hear from the victim, and I know there has been
19 a statement obtained from the victim. Counsel, is the
10:22:28 20 victim present or her mother, or do you wish me to simply
21 rely upon the victim impact statement that has been
22 submitted as part of the presentence investigation report?

23 MR. BROWN: The government would respectfully
24 ask you to rely upon the submitted paperwork.

10:22:46 25 THE COURT: All right. Thank you.

1 Mr. Kersey, you, of course, received in the
2 PSI a reference to the victim and the statements from her
3 mother regarding the harm done to her by this crime and by
4 this defendant's conduct.

10:23:01 5 MR. KERSEY: Whatever is reflected in the PSI,
6 Judge, we reviewed that.

7 THE COURT: All right. Thank you. With
8 regard to any statement you wish to make on behalf of the
9 defendant, Mr. Kersey?

10:23:11 10 MR. KERSEY: Judge, the only statement that I
11 would say, Judge, is I would ask the court to take into
12 consideration the sentencing memorandum on this. His
13 criminal history is low on this. Judge, he regrets what he
14 did, and I assure you that this was his first foray into
10:23:27 15 this type of activity. He has a lot of misdemeanors and has
16 a lot of traffic, but this sort of thing is his first
17 encounter.

18 What's reflected in the sentencing memorandum
19 is our position on it. I would like the court, if the court
10:23:38 20 would be so kind, to consider what is in the sentencing
21 memorandum, grant a departure, and allow him -- recommend
22 drug treatment pursuant to the appropriate code section I've
23 cited. Thank you, Judge.

24 THE COURT: All right. Thank you.

10:23:55 25 Counsel for the -- I am sorry, before we hear

1 from the government's counsel, Mr. Tutstone, what, if any,
2 statement do you wish to make on your own behalf?

3 THE DEFENDANT: Yes, sir, Your Honor, I
4 appreciate that.

10:24:07 5 When I first was arrested for this, I had a
6 lot of regrets, one mainly being that I missed Shannon
7 Jones, but then I realized I should have regretted meeting
8 her at all, because when I did meet her, the girl was
9 distraught and she was contemplating suicide.

10:24:27 10 And during conversations with -- that I had
11 with the young lady, she told me that I made her feel better
12 about herself and she was no longer contemplating suicide.
13 So I don't regret that I ever met her, because just the
14 conversation I had with her might have saved her life.

10:24:44 15 I can say also, Your Honor, that this
16 experience has been -- has been a deterrent for me to
17 conduct or participate in any crime in the future.

18 And I do -- I wish the court would take into
19 account that this is my first time of any offense like this.
10:25:08 20 And also there was no weapons involved. There was no -- no
21 one harmed.

22 And also, Your Honor, I just ask that you be
23 lenient with me when you impose your sentence. Thank you.

24 THE COURT: All right. Thank you.

10:25:27 25 Counsel for the government, what's the

1 government's position.

2 MR. BROWN: Thank you, Your Honor. The
3 government would request actually, and recognizing that the
4 guidelines range is 120 to 135, an upward departure to 15
10:25:39 5 years here, Your Honor.

6 The government argues that the facts in this
7 case warrant an upward departure to reflect the seriousness
8 of the offense.

9 THE COURT: Or a variance?

10:25:50 10 MR. BROWN: Variance. That's correct. I'm
11 sorry.

12 THE COURT: If I were to consider a departure,
13 I would need to give the defendant more notice than --

14 MR. BROWN: I am sorry, Your Honor. I
10:25:59 15 misspoke. A variance.

16 Your Honor, we base that request on the fact
17 that the case started when the defendant approached the
18 victim on this street because she appeared vulnerable, and,
19 in fact, the defendant's own words and statements today
10:26:16 20 reflect that, that he saw a person who looked vulnerable and
21 he approached her.

22 THE DEFENDANT: I never said I saw a person
23 that looked vulnerable.

24 THE COURT: Sir, don't interrupt. You've had
10:26:26 25 your opportunity. Don't interrupt. It's the government's

1 opportunity to speak. Do you understand me?

2 THE DEFENDANT: That's not fair, though, Your
3 Honor. He's saying something that I did not say.

4 THE COURT: Listen, sir, I've got the benefit
10:26:37 5 of a court reporter here. If there's a problem, I will go
6 back and review it. You be quiet. You sit quietly.

7 Candidly, I have to consider your conduct, and
8 even your conduct as you sit here in court might have an
9 affect on your sentence. So sit quietly. Understood?

10:26:55 10 THE DEFENDANT: Yes.

11 THE COURT: Yes, sir. Go ahead.

12 MR. BROWN: Thank you, Your Honor. It was not
13 a pre-established relationship. It was not a situation
14 where the victim sought out the defendant.

10:27:05 15 Furthermore, the defendant introduced the
16 ideas of phone sex to the victim. This, again, was not an
17 idea that she was actively pursuing or actively seeking out.
18 And he did it, I believe the record will reflect and the
19 evidence reflects, that while he was in contact with the
10:27:19 20 madam, that this was part of a larger ongoing sort of scheme
21 that he had with this girl, and the government would argue
22 that it was an overall intent to lure the victim into the
23 world of prostitution by the defendant.

24 And we rely on the statements between the
10:27:37 25 madam and the defendant, but also the defendant's own words

1 to the madam, on the stand and to the FBI. You know, on the
2 tapes he says that he had a history of managing prostitutes
3 in Philadelphia. He said he was in the game in
4 Philadelphia, and he was telling this to the madam.

10:27:54 5 Also, there's just -- in the statements to the
6 FBI and in the presentence report, this -- I don't know how
7 to characterize it -- this assertion that he's living with
8 women and women take care of him and he has this need for
9 women to take care of him. There's this willingness to
10:28:12 10 exploit people for his own gain.

11 The government would argue that this is
12 behavior of somebody who's not just an accidental tourist in
13 the world of prostitution. This person is looking for a way
14 back into prostitution with a predator in relation to the
10:28:29 15 victim.

16 He knew the victim's age from the beginning.
17 He preyed on her. He manipulated her for his own purposes
18 and own gain.

19 Very briefly about his criminal history.
10:28:38 20 There are allegations of domestic violence, and while the
21 defense counsel is correct that there are no patterns of
22 ongoing felonies and recidivist felonious behavior, there is
23 sort of a consistent law-breaking tendency of the defendant,
24 and I think that's relevant in this case, because it's just
10:28:57 25 part and parcel of his ongoing unwillingness to follow the

1 rules of society at a fairly basic level.

2 It shows all in all, the government would
3 argue, a lack of ability to rehabilitate or even a
4 willingness to do so. Even in his presentence report, he
10:29:10 5 said that he smoked marijuana daily. Even if he got
6 treatment, he would go back to smoking it daily.

7 So although the defense asks for treatment,
8 the government would argue that that sort of treatment comes
9 with a tremendous benefit, and the government has endorsed
10:29:25 10 drug treatment before in the past for certain defendants,
11 and those are defendants who approach that sort of treatment
12 and that sort of benefit with an open mind and with clean
13 intentions and not somebody who says, "Yeah, I will go back
14 to smoking dope once I'm out of jail and once I'm done with
10:29:42 15 probation."

16 All in all, the request for an upward variance
17 is based on the fact that this is a child victim who he
18 sought out for prostitution and actually sold. This was not
19 discussed. He actually sold the victim for, what he said on
10:29:57 20 tape, for pocket change. That's how he described the
21 transaction, it was for pocket change.

22 There's, I think the government would argue, a
23 complete lack of acceptance still to this day, or
24 acknowledgement even of his -- the wrongfulness of his
10:30:14 25 actions. It's just an attempt to relitigate his points to

1 minimize or to shift blame.

2 For that reason, Your Honor, we are asking for
3 the upward variance for 15 years, and we would ask for the
4 maximum 5 years' post-supervised release after. Thank you.

10:30:34 5 THE COURT: For the record, the court should
6 note, as well, and I should go back and make certain that
7 I've addressed the issue of the advisory guidelines.
8 There's a recommended advisory guideline range set forth in
9 the report. It's encompassed on pages 6 and 7 of the
10:30:52 10 presentence investigation.

11 The base offense level is 30, beginning at
12 paragraph 22, the bottom. There are no adjustments for
13 acceptance of responsibility or any other adjustments that
14 are appropriate. The total offense level, therefore,
10:31:09 15 becomes a level 30.

16 Based on the defendant's criminal record, even
17 though it is lengthy, many of the convictions do not score
18 because of age and other reasons. His criminal history
19 category becomes a II.

10:31:25 20 The advisory guideline range at offense level
21 30, Criminal History Category II on Counts 1 and 2 is 120 to
22 135 months. There's a mandatory minimum of ten years to
23 life is the statutory provisions. But guidelines, 120 to
24 135 months is the advisory range. And there is, on Counts 1
10:31:52 25 and 2, not less than five years to life for a term of

1 supervised release.

2 Counsel for the government, do you have any
3 objection to the court's advisory guideline calculation?

4 MR. BROWN: No, Your Honor.

10:32:05 5 THE COURT: On behalf of the defendant?

6 MR. KERSEY: Judge, I was looking at 30 and
7 II. I have 108 to 135. I'm sorry. That's what I had. I
8 was looking at this and --

9 THE COURT: The 108 to 135, the reason that
10:32:27 10 there's 120 is where we begin is because the mandatory
11 minimum is ten years.

12 MR. KERSEY: I understand that, Judge.

13 THE COURT: That becomes the mandatory.

14 MR. KERSEY: I understand.

10:32:35 15 THE COURT: It's 120 to 135 months.

16 Any further objection, if any, to the
17 guideline calculations?

18 MR. BROWN: No, Your Honor.

19 THE COURT: Mr. Kersey?

10:32:46 20 MR. KERSEY: No, Judge, I understand.

21 THE COURT: All right. Thank you. Anyone
22 else wish to be heard?

23 Mr. Kersey, do you wish to respond to anything
24 the government's attorney had to say?

10:32:53 25 MR. KERSEY: Judge, just briefly. He's

1 talking about a worldwide -- this girl being sold worldwide.
2 There's no testimony in the trial. The court can recall
3 that. There's none whatsoever. He has no prior convictions
4 or any involvement in prostitution. What he said at trial
10:33:08 5 at -- I don't know if I remember that, but there was no --
6 there certainly isn't any criminal history indicating that
7 he was involved in that, either convicted or arrested on
8 that. And as far as the treatment, this treatment program
9 is designed for something like him. He's never been to a
10:33:23 10 treatment facility before, and --

11 THE COURT: Treatment for what?

12 MR. KERSEY: For drug addiction, marijuana.
13 Judge, he has -- he says he has that. The treatment would
14 be for marijuana smoking that's reflected in the PSI.

10:33:36 15 And in addition to that, the entire matter
16 involved a girl, unfortunately. There's criminal conduct
17 here definitely, but it involved only Cuyahoga County,
18 Judge. That's all I have to say.

19 THE COURT: All right. Thank you. For the
10:33:52 20 record, the court would note that I have carefully
21 considered the matter. I am required to impose a sentence
22 that's sufficient, but not greater than necessary, to comply
23 with the purposes of the sentencing statute.

24 I will go through and make a finding, and also
10:34:05 25 will address the defendant's arguments for both departure

1 and/or variance. I will also address the government's
2 request for an upward variance to 15 years at 180 months.

3 The nature and circumstances of the offense
4 are that the defendant sold a minor to a known madam for
10:34:24 5 monetary gain. The defendant believed the minor was to be
6 used in her phone sex business or for phone sex. That is
7 the defendant's position. But at the time the deal was
8 made, the defendant was misinformed that this minor was
9 intended to be used not only for phone sex, but also for sex
10:34:45 10 with adult men.

11 And I believe the evidence is overwhelming in
12 that regard. The audio and videotapes clearly established
13 that the defendant was on notice for the full intent of this
14 madam for the use of this young teenager.

10:35:01 15 History and characteristics of the defendant,
16 his prior record, violence, physical abuse, diminished
17 capacity, employment, substance abuse and family ties. The
18 defendant is 44 years old. His parents are deceased.

19 Defendant described his childhood as rocky and
10:35:16 20 unsettled. He has two brothers with whom he has an
21 estranged relationship, according to the report. The
22 defendant's sisters reside in Cleveland, and he stated they
23 enjoy a familial relationship, but they do not spend much
24 time together.

10:35:29 25 The defendant has never married, but has four

1 children, ages 24 -- two purportedly age 24, an 18-year-old
2 and an 11-year-old from four past relationships. His
3 youngest child resides in Cleveland, Ohio with her mother.
4 The defendant stated his youngest daughter is very upset
10:35:50 5 with him because she was planning to live with him just
6 prior to his arrest.

7 The defendant appears to be in good physical
8 condition, has no evidence of diminished capacity. He has a
9 history of violence in his prior relationships as reflected
10:36:04 10 in domestic violence relationships, domestic violence
11 charges and other police contacts for domestic violence
12 and/or harassment. His youngest child resides in Cleveland
13 with her mother, as I've already indicated.

14 The defendant has admitted to smoking
10:36:21 15 marijuana daily at the time of his arrest. He is amenable
16 to treatment during any period of custody as well as during
17 supervision, and has reported receiving his GED in 1986,
18 which has not been verified.

19 The defendant's employment history, according
10:36:36 20 to him, includes detailing vehicles and working with various
21 contractors since 2007, as well as a long history as a
22 security guard, although none of that has been verified.

23 The defendant's criminal history is extensive.
24 It includes dismissed cases. The defendant has been cited
10:36:52 25 for driving without a valid driver's license a total of 27

1 times and convicted 15 times of the same.

2 He has two prior convictions, and two prior
3 dismissed cases for domestic violence. Including those four
4 cases, he has a total of 12 contacts with police for
10:37:11 5 domestic violence and/or harassment, and the facts of those
6 convictions are outlined in the PSI and would certainly lead
7 one to believe this defendant has a violent history when it
8 comes to women, physical contact with them. And you can
9 look at the report itself and can learn those facts, as I
10:37:32 10 have done in referring to the PSI.

11 The defendant has been arrested or ticketed or
12 under investigation a total of 58 times in reference to
13 criminal matters, including the 27 traffic infractions.
14 Most of his criminal history record does not score due to
10:37:50 15 age, excluding offenses with no convictions. The defendant
16 has had a total of 24 convictions since the age of 21, and
17 has only served approximately 155 days for all of these
18 various convictions. So he has received little or no
19 sanction for his prior involvement with the law.

10:38:09 20 I think it is somewhat telling, and I will
21 just note for any reviewing court, to review the
22 circumstances of the domestic violence cases. They involve,
23 again, violence against these particular women, and the
24 physical contact is outlined, which, of course, gives rise
10:38:31 25 to the court's concern about this defendant and his risk of

1 harm to others, as well as his general relationships with
2 women.

3 As I've already outlined, the need for the
4 sentence -- before I address the need for the sentence
10:38:46 5 imposed, there is a guideline range of 120 to 135 months.
6 There will be at least five years of supervised release, and
7 of course, there is no probation.

8 There is an argument for a variance by the
9 government, which I will address for a moment. There's an
10:39:02 10 argument for a variance by the defendant in the memorandum,
11 outlined his so-called tragic personal history, so-called
12 sociological factors, exposure to domestic violence, and
13 supposedly the defendant suffered extraordinary mental
14 abuse.

10:39:19 15 I will consider those arguments. They are
16 unverified, and given the manipulative nature of this
17 defendant and given, at least in my view, his willingness to
18 shade the truth or to tell half-truths based upon his
19 testimony at trial and, in essence, his willingness to deny
10:39:37 20 the obvious, I have grave doubts about the accuracy of some
21 of this information, alleging the rape of one of his sisters
22 by his father and other such actions.

23 The defendant allegedly being exposed to
24 domestic violence. The defendant having drug-related
10:39:55 25 issues, marijuana. I would suspect 90 percent of the

1 defendants we see here, perhaps 80 percent, have some
2 drug-related issues, and marijuana use, unfortunately, is
3 certainly rampant among various defendants and those
4 involved with the law.

10:40:13 5 That is certainly not an excuse, in my view,
6 for his use of marijuana. His use of his prior upbringing
7 is not a basis for a variance, in my mind, as well as the
8 argument that this is abhorrent behavior. I don't accept
9 that argument in any way.

10:40:29 10 The defendant, by virtue of his conduct in
11 this case, as reflected in the videotapes, it's clear to me
12 that he is certainly not new to the sex trafficking trade
13 and/or serving as a pimp for prostitutes. It's clear to me
14 that he obviously has knowledge of the trade, and certainly,
10:40:48 15 as he's indicated, in some ways on the tape, he certainly
16 represents that he, in fact, is familiar with the game, if
17 you want to call it that.

18 So I have no doubts that this is not -- even
19 though he's never been convicted, I have no doubts that the
10:41:03 20 defendant is extremely skilled in manipulating young women,
21 including the victim in this case.

22 And I should note, and I will note when I
23 address the need for the sentence imposed, we cannot
24 overlook the victim in this case and the harm done to her by
10:41:17 25 this defendant.

1 The need for the sentence imposed, just
2 punishment, adequate deterrence, protect the public, reflect
3 the seriousness of the offense, improve the offender's
4 conduct and condition. As I've noted, Mr. Tutstone has an
10:41:30 5 extensive criminal history. There's an argument, of course,
6 he has not -- no previous convictions for an offense of this
7 nature. These crimes are extremely difficult to prosecute.
8 The victims are extremely difficult to find many times.
9 They're unwilling to come forward. They are embarrassed by
10:41:50 10 the conduct. And it is a very difficult crime to prosecute.

11 Defendant has not accepted responsibility for
12 his actions. He certainly is free to continue to argue that
13 he is innocent, but the evidence, in my view, is
14 overwhelming that indeed he is guilty of this offense. And
10:42:06 15 I believe there's substantial evidence to support the fact
16 that he has made his living, in essence, in the sex trade as
17 either a pimp or, in essence, preying upon young girls,
18 along with this 17-year-old.

19 His substance abuse is no excuse. Use of
10:42:21 20 marijuana doesn't drive one to become involved in the sex
21 trafficking trade. Mental health counseling may or may not
22 be necessary depending upon -- it's difficult to ascertain
23 if he's amenable to same given his manipulative nature and
24 given how he attempts to mislead and the lack of candor
10:42:41 25 makes it difficult for any counseling, in my view, to be

1 successful.

2 The guideline range may be inadequate. The
3 government makes a compelling argument; however, I will
4 decline to vary upward. I will, however, impose a sentence
10:42:56 5 at the highest end of the guidelines, which will hopefully
6 provide adequate deterrence and protect the public. This is
7 a high-risk offender. This is an individual who, should he
8 be released, he will once again continue this conduct, in my
9 view, unless he is restrained and in custody for a long
10:43:13 10 period of time.

11 The victim in this case, as reflected in the
12 PSI, suffered from this defendant's conduct. Her mother was
13 an individual who was a single mother, a single mom who was
14 working, maintaining full-time employment. Her daughter was
10:43:30 15 attending school, and this defendant's preying upon this
16 child, and that is what she is, she is a child, she came
17 into court and testified, she's vulnerable, subject to being
18 easily preyed upon by an individual like Mr. Tutstone.

19 So it's clear to me that he certainly used his
10:43:48 20 skills and abilities to prey upon this young lady. She is
21 continuing in counseling. She needs that counseling. And
22 she has -- of course, the adverse effects of this has
23 affected her education and will in many ways affect her
24 potential future.

10:44:03 25 So I cannot overlook the harm to the victim,

1 and I need to impose a sentence that will reflect the
2 seriousness of the offense. This type of conduct, this type
3 of crime is becoming -- certainly has been well reported in
4 the media. And with great frequency, sex trafficking is an
10:44:20 5 ongoing problem in our communities. It is under-reported.
6 It is under-prosecuted, if I can use that term, simply
7 because of the difficulties in finding young women to come
8 forward, and also finding someone who is willing to assist
9 the government as the madam in this case was willing to do.

10:44:38 10 Even she, Mr. Tutstone, even a madam, someone
11 who had worked in the sex trade providing prostitutes, adult
12 prostitutes, even she was shocked by your willingness to
13 attempt to, in essence, sell this minor.

14 And so, therefore, for all of the reasons, as
10:44:57 15 tempted as I am to impose a much lengthier term of
16 imprisonment, I will decline to do so, and note for the
17 record, I've considered all of the arguments made in the
18 sentencing memoranda.

19 None of them are more compelling than the need
10:45:10 20 to deter this defendant, to keep him off the streets and
21 also to send a message to the public in general that this
22 type of crime will be dealt with harshly and appropriately.

23 So for all those reasons, pursuant to the
24 Sentencing Reform Act of 1984, and 18, United States Code,
10:45:28 25 Section 3553(a), it will be the judgment of the court that

1 the defendant will be imprisoned for a term of 135 months on
2 each count to be served concurrently and not consecutively.

3 Upon being released from prison, the defendant
4 will be placed on supervised release for a term of ten
10:45:43 5 years. Five years is the mandatory, is the -- let me
6 restate that just so it's clear for the record.

7 It will be ten years. As to Counts 1 and 2,
8 the mandatory minimum is ten years to life. The supervised
9 release on Counts 1 and 2 is not less than five years to
10:46:09 10 life. I will impose ten years on each count to run
11 concurrent. I go far above the five years, because this
12 defendant, as I've indicated, is a high risk.

13 Supervised release is necessary for a lengthy
14 period of time, so that if indeed he returns to this trade,
10:46:22 15 indeed he will face a harsh sanction and a lengthy prison
16 term. And he needs to be supervised for far more, in my
17 view, than the five years that has been the minimum.

18 In addition, the additional conditions that I
19 will impose as part of the court's sentence will be as
10:46:37 20 follows:

21 There will be no fine. As I've said,
22 supervised release for ten years each on Counts 1 and 2 to
23 run concurrently.

24 Within 72 hours of release from custody of the
10:46:49 25 Bureau of Prisons, the defendant shall report in person to

1 the U.S. Probation Office in the sentencing district to
2 which the defendant is released.

3 There is no fine. There is no restitution.

4 A special assessment of \$200 shall be due
10:47:01 5 immediately.

6 While the defendant is on supervision, he
7 shall not commit another federal, state or local crime,
8 shall not illegally possess controlled substances and comply
9 with the following additional conditions:

10:47:11 10 Mandatory drug testing will be in place.
11 Defendant shall refrain from any unlawful use of a
12 controlled substance and submit to one drug test within 15
13 days of commencement of supervision, and at least two
14 periodic drug tests thereafter as determined by his pretrial
10:47:27 15 services officer.

16 Defendant cannot possess a firearm,
17 destructive device or any dangerous weapon.

18 Search and seizure will be in place. The
19 defendant will be required to submit his person, residence,
10:47:39 20 place of business, computer or vehicle to a warrantless
21 search conducted and controlled by his U.S. Probation
22 Officer at a reasonable time and in a reasonable manner,
23 based upon reasonable suspicion of contraband or evidence of
24 a violation of a condition of release. Failure to submit to
10:47:54 25 a search may be grounds for revocation. And the defendant

1 shall inform any other residents that the premises may be
2 subject to a search pursuant to this condition.

3 Drug treatment and testing. Part of this
4 supervised release, if indeed he wishes drug treatment for
10:48:10 5 his admitted marijuana addiction, then obviously he will be
6 required and shall participate in any program which will
7 include drug and alcohol testing.

8 He will be designated a sex offender, and
9 pursuant to 18, United States Code, Section 3583, he will be
10:48:26 10 required to register under the Sex Offender Registration
11 Notification Act and must comply with the requirements of
12 the act as directed by his probation officer.

13 Pursuant to the Adam Walsh Child Protection
14 Act of 2006, the defendant shall register as a sexual
10:48:41 15 offender not later than three business days from his release
16 from custody. The defendant will keep the registration
17 current in each jurisdiction in which he resides, is
18 employed or is a student.

19 The defendant shall, no later than three
10:48:55 20 business days after each change in name, residence,
21 employment or student status, appear in person in at least
22 one jurisdiction in which he has registered and inform that
23 jurisdiction of all changes and reporting information.

24 Failure to do so may be a violation of his
10:49:10 25 conditions of supervised release and may be a new federal

1 offense punishable by up to ten years.

2 The defendant will participate in any
3 outpatient mental health treatment program. I've already
4 touched on it, and that has been addressed earlier.

10:49:27 5 And, in addition, the defendant will abide by
6 all of the rules of the Minor Protection and Restriction
7 Program of the U.S. Pretrial Services and Probation Office.

8 The defendant shall submit to mental health
9 evaluation and sex offender assessment as directed by his
10:49:43 10 probation officer. He will participate in any treatment
11 program, including for sexual deviancy, which may include
12 polygraph testing if recommended by these evaluations.

13 The defendant shall submit to periodic
14 polygraph testing as directed by his probation officer. And
10:49:58 15 no violation proceedings will be based solely on the results
16 of a polygraph examination or a valid Fifth Amendment
17 refusal to answer a polygraph question.

18 The defendant shall not have any contact with
19 the victim or the victim's family, including letters,
10:50:12 20 communication devices, audio or visual devices, visits or
21 any contact through a third party without prior written
22 consent of the probation officer.

23 He will cooperate in the collection of DNA,
24 and his computer may be searched or the consent -- he will
10:50:31 25 consent to the U.S. Probation Office conducting periodic and

1 unannounced examinations of his computer, which may include
2 retrieval and copying of all memory from hardware, software
3 and/or removal of such system for the purpose of conducting
4 a more thorough inspection.

10:50:45 5 The defendant shall submit his person,
6 residence, place of business, computer or vehicle to a
7 warrantless search, as I've addressed earlier, conducted and
8 controlled by the U.S. Probation Office in a reasonable time
9 and in a reasonable manner, based upon reasonable suspicion
10:50:59 10 of contraband or evidence of a violation of a condition of
11 release. Failure to submit to a search may be grounds for
12 revocation, and the defendant shall inform all of the other
13 residents of this condition.

14 Before I address appellate rights, under U.S.
10:51:16 15 versus Bostick, any objections, corrections, any arguments
16 that I haven't addressed that I may need to address before I
17 adjourn the sentencing hearing?

18 Counsel for the government, please?

19 MR. BROWN: None from the government. Thank
10:51:27 20 you, Your Honor.

21 THE COURT: On behalf of the defendant?

22 MR. KERSEY: Judge, thank you very much. I
23 might have missed this. Did the court rule on our request
24 for a recommendation for drug treatment? I might have
10:51:41 25 missed it.

1 THE COURT: I will note for the record that I
2 will not recommend drug treatment. I will leave that to the
3 Bureau of Prisons. The issue of marijuana, obviously he's
4 in custody. He will not have the ability to obtain the
10:51:51 5 drug. And, in fact, if the BOP feels that he requires some
6 use of marijuana -- or some treatment for marijuana, then
7 they can choose to do so. But I will not recommend
8 treatment other than when he's released from custody, the
9 probation department can assist him in that regard.

10:52:06 10 I'm not convinced in any way that drugs are
11 related or his use of marijuana is in any way related to
12 this offense or that he has any ongoing problem that
13 requires the resources of the drug treatment program and the
14 BOP.

10:52:22 15 MR. KERSEY: Thank you, Judge.

16 THE COURT: All right. Mr. Tutstone, you have
17 a right to have an appeal filed from the court's sentence,
18 and, obviously, from your conviction as well. I will reduce
19 your sentence to writing. There will be a written order.

10:52:32 20 Fourteen days from the date that order is issued will be the
21 time with which you will need to file your notice of appeal.

22 Mr. Kersey, I would ask you simply to file a
23 notice of appeal on his behalf, if you would, and we will
24 appoint other counsel for purposes of the appeal.

10:52:46 25 Are you able to do that for us?

1 MR. KERSEY: Yes, sir, I will.

2 THE COURT: All right. And then we will --
3 either I or I will ask the circuit to appoint counsel for
4 purposes of your appeal, Mr. Tutstone.

10:52:57 5 THE DEFENDANT: Thank you, Your Honor.

6 THE COURT: Anything else on behalf of the
7 government?

8 MR. BROWN: Nothing else. Thank you.

9 THE COURT: Sir?

10:53:02 10 MR. KERSEY: Thank you, Judge.

11 THE COURT: Thank you, Mr. Kersey, for your
12 work. We appreciate your service to the defendant and
13 acting as a CJA counsel in the matter.

14 We will stand adjourned, please.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Lori A. Callahan
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